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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1064

GENERAL ELECTRIC COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A77) was issued on October 28, 1969, and is not yet officially reported. The decision and order of the National Labor Relations Board (Pet. App. C) are reported at 150 NLRB 192.

JURISDICTION

The Company's petitions for rehearing and rehearing en banc were denied on December 2, 1969, and the judgment of the court of appeals was entered on the same date (Pet. 2; Pet. App. A78–A79). The petition

for a writ of certiorari was filed on January 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an employer has bargained in bad faith, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, where the totality of circumstances indicate that it has in effect adopted a "take-it-or-leave-it" attitude with respect to its contract proposals and has hardened that attitude by a publicity campaign emphasizing their non-negotiability.

2. Whether an employer violates Section 8(a)(5) and (1) of the Act by offering to make additional accident insurance coverage available to its employees on its own terms during the term of a collective bargaining contract and refusing to bargain with the union about the matter until the contract comes up for renegotiation.

3. Whether an employer violates Section 8(a)(5) and (1) of the Act by refusing to furnish the union during collective bargaining negotiations with information concerning the cost of insurance and pension improvements offered by the employer, although the information was in the employer's possession and was relevant and necessary to the performance of the union's collective bargaining function.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. B1–B6.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. BACKGROUND

This case arises out of the 1960 negotiations between the International Union of Electrical, Radio and Machine Workers, AFL–CIO ("IUE" or "the Union") and General Electric Company ("GE" or "the Company") for a new collective bargaining agreement. In 1960, the IUE represented a substantial majority of GE's unionized employees (Pet. App. C31).[1]

The general approach which the Company took in the 1960 negotiations had been conceived in 1947, chiefly by Vice-President Lemuel R. Boulware, in an effort to avoid repetition of the result of a 1946 strike which had been broadly supported by GE employees, and was highly successful (Pet. App. C37–C38). The new approach called for GE to apply its product marketing skills to employment relations. It was to engage in extensive year-round research into business conditions, competitive factors, and employee needs and desires. On the basis of its evaluation of

[1] Since the 10,000 pages of hearing transcript and the additional thousands of pages of exhibits which comprise the record in this case were not reduced to a printed appendix below, the references herein are to the factual findings of the Trial Examiner. These were adopted by the Board, were accepted by the court of appeals, and are not disputed in the petition for certiorari. Where references would be unduly repetitious, a single reference has been inserted at the end of a paragraph.

all the facts, the Company would, "at the proper time," present to the unions with whom it dealt a "fair, firm" contract offer—one which contained all that GE had found to be warranted, with nothing held back for later trading or compromising. Although the Company professed a willingness to make prompt adjustments whenever new information or a significant change in facts indicated that its offer fell short of being "right," it believed that if its research were complete and accurate there would be no need to change the offer, save in exceptional circumstances (Pet. App. C38–C41).

The Company also decided that it was important to treat all of its employees uniformly. Accordingly, it would not only prepare and present similar offers to all unions representing its employees, but also would guarantee to nonrepresented employees the same pay and benefit programs that would be available to the represented employees (Pet. App. C43–C45).

Finally, GE decided to use a wide variety of communications media—newspapers and plant bulletins, letters to employees, television and radio, speeches by Company officials, and even informal conversations between employees and their immediate supervisors—to "market" management positions directly to employees on a year-round basis and also to obtain "feedback" from the employees. As contract negotiations approached and while they were in progress, GE would intensify its communications program in

an effort to explain its position to the employees and to persuade them to choose it over that of the unions. In particular, the communications would seek to emphasize to both employees and union representatives that, since the Company had "voluntarily done right," there could be no profit in a show of force; management would not change its offer simply because of a threatened or actual strike, and would "take" a strike of any duration to resist doing what it considered to be "wrong" (Pet. App. C40–C42).

2. THE PRELIMINARY MEETINGS IN EARLY 1960

Under the 1955 contract between GE and the IUE, the earliest date that either party could compel the beginning of negotiations for a new contract was August 16, 1960, 45 days before the terminal date (Pet. App. C45, C54). Early in 1960, Vice-President Parker and Union Relations Manager Moore toured GE plants around the country to emphasize to local officials and supervisors that the Company's success in negotiations would depend on "the communications that you are doing—both written and oral—and the man-to-man communications relationship that you have built up * * *" (Pet. App. C51–C54). Company and Union officials met informally on January 26, 1960, and thereafter in regard to compiling a common body of information (Pet. App. C54–C55). The Union suggested that actual negotiations should begin well before the mid-August date, and GE eventually agreed to meet with Union representatives on June 13, 1960,

solely for the purpose of hearing the Union's presentation and explanation of its contract demands (Pet. App. C55).

When the parties met on June 13, the Company's reactions to the Union's proposals were that they were "ridiculous," "astronomical" in cost, and not designed for an early settlement (Pet. App. C60–C61). The June 13 meeting also produced a clash over the Union's demand for bargaining about a Company offer—made by letter on June 1—to provide additional accident insurance coverage as of July 1 to employees who desired it and were willing to pay the full cost. This coverage went beyond that provided on a contributory basis under the current contract. The Company insisted that the matter was not bargainable, at least until the start of formal negotiations on a new contract, and that the Union's only option at this time was either to accept the offer, which had already been publicized to the employees, or to reject it. The Union objected to the Company's refusal to bargain about the insurance offer, and decided to reject it. The Company proceeded to make the additional insurance available to employees who were not represented by the IUE, as it had indicated it would do (Pet. App. C56–C59).

Thereafter, the parties agreed that bargaining sessions would start July 19 on the subject of employment security, and that four weeks would be devoted to an effort to reach agreement on this matter. It was understood that, if such agreement were reached prior

to August 16, the parties would move on to other subjects; if, however, no agreement were reached by then, employment security would remain open for negotiation along with all other contract matters (Pet. App. C65–C66).

Meanwhile, GE began to attack the proposals which the Union had thus far presented. The Company reprinted in its plant newspapers articles from other sources which were highly critical of the Union's demands, including one which inaccurately estimated their cost at a half-billion dollars for the recognized employees alone. And, in a July 1 newsletter for supervisory personnel and community leaders, the substance of which was later repeated in numerous communications directed at the employees, GE asserted that the IUE's demands would add more than $500,000,000 to its total employment costs in the next two years, would harm the Company's assertedly precarious competitive position, and could eventually "destroy thousands upon thousands of jobs" (Pet. App. C61–C64).

3. NEGOTIATIONS DURING JULY AND AUGUST OF 1960

Between July 19 and August 11, 1960, the Company and the Union held twelve meetings on employment security (Pet. App. C74–C75). A key Union demand was establishment of a plan for payment of supplementary unemployment benefits (SUB), but it also made proposals relating to subcontracting, overtime work, automation, transfer of employees to

new plants, and separation pay (Pet. App. C75). GE refused to agree to the Union's SUB plan or to any of its other employment security proposals (Pet. App. C75–C77). When Union negotiators asked what the Company was prepared to do in this area, the response was that GE did not have its proposals ready, that it wanted its negotiators to have more information, and that it would present proposals at an unspecified "appropriate time * * * after we have explored everything and heard from local management" (Pet. App. C77–C78). The Company then devoted five bargaining sessions to lengthy prepared oral presentations from local Employment Relations Managers (Pet. App. C78). The Union complained that these sessions were a waste of time since the information could have been submitted in writing (Pet. App. C80). It further objected to the Company's refusal to permit the Employment Relations Managers to answer questions as to the desirability and practicality of applying the Union's specific employment security proposals at their respective locations (Pet. App. C79–C80). The negotiating sessions concerned exclusively with employment security concluded on August 11, with another prepared GE presentation, this time on the general causes of employment instability. The Company gave no indication of the proposals it was eventually to make, and was then contemplating, on the issue of employment security (Pet. App C79, C81–C82). As one GE publication admitted, despite the prior agreement to bargain (*supra* pp. 6–7), "There was no intent on the part of the Company to reach

an 'agreement' or solution to this complex problem during the initial four weeks of talk" (Pet. App C83).[2]

In the meetings between August 16 and 25 on the Union's overall contract demands, the pattern was much the same as that in the earlier sessions on employment security. Thus, the Union presented its justifications in support of its economic and other proposals, and the Company criticized and commented, but refused to agree to any of the Union's requests or to submit proposals of its own. The Company made clear that its eventual offer would be insufficient to cover the Union's economic demands, would be "thinner" than offers made in previous years, and would eliminate the cost-of-living escalator clause which had been part of the prior contract. However, when the Union asked GE to reveal how much it had available for its entire package so that the Union might suggest how that amount should be apportioned, the Company declined to do so. Nor was the Union able to learn from GE what the Company

[2] While GE held back at the bargaining table, its plant publications carried accounts of the negotiations, often daily, which were based on teletyped summaries sent from Company headquarters (Pet. App. C69–C70). These accounts—as the Trial Examiner described them—"were slanted in the Company's favor, sometimes presented the Company's arguments to the employees more fully than the Company did at the bargaining table, frequently failed to present the Union's position at all, * * * when stating the Union's contentions, often did so in a manner so abbreviated or editorialized as to give an inaccurate or unfavorable impression of the Union's position on the issues * * *," and "at some plants, * * * [untruthfully] purported to provide the employees with a *full* account of what occurred in the conference room" (Pet. App. C70).

thought the Union's demands would cost, even though the Company had characterized them as "astronomical" and had complained about the expense of certain items in particular. The Company asserted that it "never attempted to put costs on each of these items because we talk about the level of benefits that our package has" (Pet. App. C84–C87; and see also pp. 457–458, 460, 464–465, 476, 482, 596, 627, 630, 636 of the Negotiating Minutes, General Counsel's Exh. 2B).

4. GE'S OFFER AND THE NEGOTIATIONS IN SEPTEMBER 1960

On August 29, two ranking Union officials met informally with Company representatives and received a preview of the offer which GE planned to present the next day to the IUE and other unions (Pet. App. A88–A91). The Union officials protested that it was not responsive to the Union's proposals, and urged that formal presentation of the offer and its release to the press be delayed until the Union had a chance to examine it and suggest changes (Pet. App. C91–C92). GE refused to postpone presentation to the full IUE committee, but agreed to delay presentation of the offer to other unions and its release to the public. At the IUE presentation on August 30, the Union officials again protested the Company's lack of responsiveness to the Union's proposals, but suggested that the GE offer could serve as a basis for discussion during the next three days if there were no publicity. The Company responded that it had not held back anything and that the employees should know what was on the table. At the opening of the negotiating

session on the following day, the Company announced that its offer would be released to the public forthwith (Pet. App. C92–C94).

With release of the offer, the Company embarked on an elaborate and well planned campaign to sell its proposal to the employees. The Company deluged the employees at some plants with at least one and sometimes as many as three or four messages a day. Plant meetings featured slides, tape recordings, prepared scripts, and question and answer sessions. The Company's communications emphasized that GE's offer was "right," that no more could be given without endangering the future of the business and the jobs of employees, and that a "long pay-losing strike" was likely to result unless the offer was accepted. Also, the motives and tactics of the Union's leaders were attacked as being at odds with the best interests of the employees (Pet. App. C71–C72, C94–C103, C110–C111, C112–C120, C125–C132).

At the bargaining table, the Company adhered to its offer as presented to the Union on August 30 (Pet. App. C102–C103, C106). When the Union sought to ascertain the estimated cost of that offer, the Company's chief negotiator, Moore, replied that he did not know the cost "because it hasn't occurred yet," and that the Company had not put a figure on its package. The Union expressed disbelief that Moore did not know the cost of the GE offer, whereupon he again denied having any such estimate and explained, "GE works on a level of benefits basis, not the cost per item." In fact, however, the various items in the Com-

pany's proposal had all been cost-estimated by management representatives on a Company-wide basis prior to release of the GE offer (Pet. App. C104). Moreover, Company negotiators frequently cited cost as a consideration in rejecting Union demands, as for example with regard to improved maternity benefits, the length of the contract, supplemental unemployment benefits, continuation of the cost-of-living escalator clause, and the effective date of pension plan changes (Pet. App. C137–C138).[3] Indeed, GE repeatedly emphasized, both in its publicity and at the bargaining table, that "[a]ny increase in cost will make us less competitive" and that it was worried about the impact of competition, particularly foreign competition, on its operations (See Negotiating Minutes, General Counsel's Exh. 2B, p. 1118).

The Union encountered the same tactics when it claimed that the wage increase proposed by the Company was inadequate and that worker productivity justified a higher amount. The Company replied that "there is no direct relationship of productivity to wages," but refused to indicate the factors that had influenced its wage offer. When pressed on the matter,

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[3] Note the following bargaining table exchange (Pet. App. C105):

> Swire [Union]: We are asking for an improvement in maternity. We want the Company to pay everything up to $550, then co-insurance after that.
>
> Willis [Company]: Something like that is out of reach. Maternity is the most expensive item.
>
> Swire: What does it cost, Sid?
>
> Willis: We talk level of benefits, not costs.

Company negotiator Moore stated that other wage settlements had a bearing, but then declined to go into particulars because the information was in the "public domain"; he added that Union representatives should have prepared themselves on this before the meeting. Ultimately, Moore declared that "[t]he wage increase justifies itself," and "[w]e bargain on what is the appropriate thing to do and the level of benefits" (Pet. App. C105–C106).

Similarly, the Union sought to change the effective date of the pension and insurance plan improvements from January 1, as proposed by the Company, to October, the contemplated starting date of the new contract. The Company first argued that the earlier date would be too costly, but, when the Union asked how much the difference would be, it retreated to the "we talk level of benefits" refrain. Next, GE argued that prior contracts had always provided for pension increases on the first of the year. When the Union demonstrated this was untrue, one GE negotiator promised to "consider" the October date. Later that same day, however, this concession was withdrawn. GE's subsequent explanations for the January 1 date were, "it's the beginning of the year * * * the time you make all the resolutions for the New Year's," and, "We think it is the appropriate date" (Pet. App. C138–C140; and see Pet. App. A12–A13).

On September 22, the Union made a further effort to obtain information relevant to the bargaining issues from the Company by requesting in writing that GE supply it with data indicating the cost per employee

in IUE bargaining units of the pension insurance improvements proposed by the Company, the number of employees involved in layoffs and recalls, and the number of employees with 20 and 25 years of continuous service. The layoff and recall information was desired so that the Union could evaluate the likely impact of an Income Extension Aid plan proposed by the Company; the 20 and 25 year continuous service information was needed to test the Company's assertion that an extra week of vacation after 20 years would be too expensive, but an extra week after 25 years would be acceptable if the Union were willing to forego a portion of the wage increase proffered by GE. On various occasions prior to its written request, the Union had orally requested similar information from the Company without success. For example, on September 8, the Union had asked how many employees would have benefited over the past 2 years from the Company's proposed Income Extension Aid plan had the plan been in effect then. The Company's chief negotiator replied, "Somewhere between zero and 100%," and another GE negotiator suggested that the Union should request the information in writing if it really wanted to know. But, even after receiving the Union's written request on September 22, the Company refused to submit the pension and insurance cost data; it took no active steps to collect the other information until after the end of the strike, when it no longer had any value in the negotiations. GE readily and without undue burden could have provided the Union with the requested information in a

form that probably would have been acceptable to the Union (Pet. App. C104–C105, C176–C194; and see Pet. App. A27–A33).

In accordance with the schedule agreed to in July, talks recessed in mid-September to permit the Union's negotiators to attend the IUE convention in Florida (Pet. App. C66, C132). Just as the Union's negotiators were about to leave for the convention, GE made the first change of any significance in its offer of August 30; it proposed giving the Union the option of substituting an extra holiday and a fourth week of vacation for employees with 25 years of service, for 1% of a previously proffered 4% mid-contract wage increase (Pet. App. C108–C109, C221–C222).[4] The Company proposed this modification even though the Union had already indicated that such a substitution would be unacceptable because the GE wage offer was too low as it was. The proposal was publicized to the employees before further bargaining about the matter could take place (Pet. App. C104–C111).

As the October 1 expiration date of the existing contract approached, GE openly assumed an increas-

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[4] On September 8, the Company had also offered to make its proposed wage increase effective on Monday of the week a new contract was signed instead of October 2, as originally proposed. The Union had not asked for this change, and Company negotiator Moore indicated that he did not expect the Union to accept it because "you are going to the convention." The Company offered the early signing bonus to other unions as well, and then later told the employees in its communications that the Union was deliberately "stalling" negotiations and depriving its members of the benefits of an early settlement (Pet. App. C107).

ingly intransigent posture. In its publicity to the employees, it continued to argue the merits of its offer, occasionally departing from positions taken at the bargaining table (Pet. App. C125–C128).[5] And, after the IUE convention had recommended the scheduling of a strike vote, GE's communications began to concentrate on the futility of a strike because "[t]he Company has offered *everything* that appears to be right * * * and will not 'up' the offer because of strike threats or strike action" (Pet. App. C117); "everything that we are going to propose is on the bargaining table now, and there is simply nothing more to come" (Pet. App. C118). The Company also sent letters to local Union officials proposing to alter the date of the strike vote, the places of voting, and the wording of the ballot. Newspaper advertisements indicated that a strike threatened employment security and, at some plants, specifically warned of loss of jobs and promotions and of plant closings (Pet. App. C112–C116, C126–C130). The Company's stated view was that the "real scene of negotiations [had] shift[ed] from New York to all IUE represented plants * * * [where] the eventual outcome will be decided—quite properly—and quite soon" (Pet. App. C112).

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[5] For example, despite its "level of benefits" approach at the bargaining table, at Schenectady the employees were informed that a fourth week of vacation for 20-year employees would represent "a very sizeable increase in costs * * * and we just don't dare incur the extra cost with the uncertain future that faces us at this time" (Pet. App. C127–C128).

Meanwhile, at the bargaining table, the Company's chief negotiator advised the Union on September 21 that GE's position was "firm" and "fixed"—"[c]ome October 2, Thanksgiving, Christmas, Easter, it won't be any different * * *" (Pet. App. C118). This point was confirmed by Company directives issued on September 20, 22 and 23, authorizing its operating managers to make effective for nonrepresented employees, retroactive to September 12, the wage increase which had been offered to the IUE and the other unions. The Company also committed itself to put into effect for the nonrepresented employees various other portions of its offer. Aware of the Company's policy of treating represented and nonrepresented employees uniformly, the Union asked Company negotiators whether the directives "will inhibit you from making any modification to the arrangements that you proposed for us." The Company replied it was "a factor" that GE had "to take into consideration" (Pet. App. C120–C125).

Thereafter, one Union negotiator, seeking to explore "a possible chance of changing the proposal * * * within the framework of the cost" and finding himself frustrated by the Company's response, asked GE negotiators whether at this point they could so much as "even dot an 'i' or cross a 't' * * *. It is all on the table. Is there any chance of changing your positions one iota?" Company negotiator Moore replied, "* * * after telling the employees before they went to vote that this is it, we would look ridiculous to change it at this late date; and secondly the answer is no. We aren't changing anything come

a strike or high water." Another Company representative then indicated that, with a strike threatened, GE would "look * * * foolish in the eyes of our people and of the country" if it changed its offer in the final stages of negotiations (Pet. App. C140–C147; see also p. 1246 of the Negotiating Minutes, General Counsel's Exh. 2B).

5. THE STRIKE, AND THE UNION'S EVENTUAL SURRENDER

The Union struck on October 2, after the Company had turned down a proposal by Federal mediators, which the Union favored, for an unconditional extension of the present contract while bargaining continued for a new contract (Pet. App. C146–C147). At Schenectady, where the IUE Local did not join the strike until October 6, and at Pittsfield, where the Local was already on strike, GE representatives offered strike truce terms to the Local Union officials which had not been offered to the IUE's national negotiators. Thus, GE promised the Schenectady and Pittsfield locals that, if their members remained or went back to work, it would retain in effect all provisions of the expired contract, except for the cost-of-living escalator clause. Only after the IUE filed unfair labor practice charges against the Company, on October 4, did GE make the same terms available to the Union's national negotiators, who then rejected them. Despite this rejection, the Company persisted in urging local Union officials at Lynn, Bridgeville, Waterford, and Syracuse separately to accept its strike truce proposals (Pet. App. C148–C154, C194–C206, and see Pet. App. A34–A39).

Meetings between the parties continued during the strike, but all attempts by the Union to induce GE to modify its position proved futile, as did the efforts of Federal mediators to find a compromise basis for settlement. On October 19, after rejecting still another Union proposal, the Company announced "we are at a legal impasse * * * and we see no useful purpose being served by further meetings with the Union at this time * * *" (Pet. App. C158). That same day, the Union indicated its willingness to capitulate, and, on October 22, signed a short memorandum of settlement accepting the Company's offer (Pet. App. C161, C167). That offer, substantially unchanged since August 30 except for the early signing bonus and the holiday-vacation option (*supra,* p. 15), had been presented only in outline form (Pet. App. C159). The Company refused to produce definitive contract language (which it had available) until the Union had indicated it was in total agreement with the Company's proposals and had signed the short form memorandum (Pet. App. C159–C163). Nor would the Company comply with the Union's request to sign a bilateral strike settlement agreement; instead it insisted on issuing a unilateral "letter of intent" stating how it "intends to handle * * * certain matters relating to resumption of work" (Pet. App. C165–C168). The Union terminated the strike as of October 24, 1960, and the formal agreements were finally concluded and executed on November 10, 1960 (Pet. App. C168, C173).

B. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board and previously its Trial Examiner concluded that GE violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union during the 1960 contract negotiations. The Board based its conclusion "on the totality of the [Company's] conduct at and away from the bargaining table" (Pet. App. C252), including the fact that the Company had in effect entered into negotiations "'with a predetermined resolve not to budge from an initial position'"[6] and had further hardened that position by its campaign among the employees, by presenting an accident insurance proposal to the Union in June 1960 on a take-it-or-leave-it basis, by failing timely to honor the Union's written and oral requests for relevant information, by attempting to deal separately with IUE locals on strike truce terms which were properly the subject of national renegotiations, and by soliciting the locals separately to abandon or refrain from supporting the strike (Pet. App. C2–C3, C7).[7] The

[6] Quoting from *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149, 154 (separate opinion of Frankfurter, J.).

[7] The Board also found the latter three actions to constitute independent violations of Section 8(a)(5) and (1) of the Act (Pet. App. C176–177, C194, C205–206, C213).

Members Leedom and Jenkins disagreed with the majority's conclusion that the Company's overall approach to and conduct of bargaining violated Section 8(a)(5) and (1) of the Act (Pet. App. C11–C21). Also, Members Jenkins and Fanning disagreed with the majority's conclusion that the Company's presentation of its accident insurance proposal violated Section 8

Board ordered the Company to cease and desist from the unlawful conduct found, and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. The Board also ordered the Company to furnish the Union with information similar to that which had been requested, and to post appropriate notices (Pet. App. C10, C258–C262).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals, in an opinion by Judge Kaufman, enforced the Board's order, holding that "an employer may not so combine 'take-it-or-leave-it' bargaining methods with a widely publicized stance of unbending firmness that he is himself unable to alter a position once taken" (Pet. App. A53). Judge Waterman concurred in a separate opinion, in which he stated that he did not differ "from the majority opinion in any way" or with the Board (Pet. App. A55–A56). Judge Friendly dissented from the court's action in sustaining the Board's finding of overall bad faith on GE's part and its finding of a specific unfair labor practice in GE's June offer of the accident in-

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(a)(5) and (1), although Member Fanning believed that GE's take-it-or-leave-it position on that subject could properly be considered in gauging GE's overall good faith in the negotiations (Pet. App. C2, n. 3, C12).

The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by refusing to reinstate 20 strikers who had been replaced, but this finding is not material to the Section 8(a)(5) violations described above or to the issues raised by the petition (Pet. App. C175, C253–C254).

surance plan. However, Judge Friendly agreed that the Company violated the Act by refusing to furnish cost information and by bargaining with locals during the strike (Pet. App. A57–A77).

ARGUMENT

A. The Board's finding that GE manifested overall bad faith in the 1960 contract negotiations, sustained by the court of appeals, was a correct application of settled legal principles to the voluminous facts of this particular case. The principles themselves, identifying bargaining tactics and posture so objectionable as to demonstrate lack of good faith, are neither novel nor in dispute. The only possibly novel feature of this case involves their application to an employer who, while using such tactics, nonetheless did appear willing to enter into an agreement—as long as it was the one which it had predetermined.[8] Given the fundamental correctness of the Board's inquiry into good faith, however, that possible novelty—tied as it is to the peculiar facts of

[8] The principles have also been applied to a union which attempted to impose an area standards contract in circumstances which made clear that "bargaining" with individual employers would not be entertained. *IBEW and Phil Sears Electric Service*, TXD–712–69, Case No. 9–CB–1445, adopted by the National Labor Relations Board in the absence of exceptions, January 28, 1970. There is, of course, no conflict with this Court's decision in *United Mine Workers* v. *Pennington*, 381 U.S. 657, which observed in an entirely different context that "a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers" (p. 665). Whether or not the union bargains in good faith in seeking such terms depends entirely, as it did with regard to GE here, on the particular facts of the particular negotiations.

these particular bygone negotiations—reflects no more than the Board's adaptation of its principles to a particular situation; in the absence of conflict, it raises no issue warranting this Court's review. See *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 410.

1. In *National Labor Relations Board* v. *Insurance Agents' Union*, 361 U.S. 477, this Court recognized that "[c]ollective bargaining * * * is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it';" though "the parties need not contract on any specific terms * * * they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground" (pp. 485, 486).[9] Similarly, in *National Labor Relations Board* v. *Katz*, 369 U.S. 736, the Court held that the parties must refrain not only from behavior "which reflects a cast of mind against reaching agreement," but from behavior "which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion" (p. 747). Thus, petitioner errs in assuming (Pet. 14–16) that an employer or a union discharges its bargaining obligation under the Act merely by displaying, as did GE, a willingness to enter into some form of agreement. As the Board pointed out (Pet. App. C210): " '[The] duty of management to bargain in good faith is essentially a corollary of

[9] See also Cox, *The Duty To Bargain In Good Faith*, 71 Harv. L. Rev. 1401, 1411 (1958): "To offer the union a contract saying, 'Take it or leave it,' is not bargaining collectively within the meaning of the act."

its duty to recognize the union.' [10] Performance of that duty therefore also contemplates full acceptance by management of the representative status of the Union, not as a bare advisor, but as a joint participant in the establishment of the wages, hours and working conditions."

2. Applying these principles, the Board was amply warranted in concluding that GE did not bargain in good faith in the 1960 negotiations. By adopting policies which stressed that its offer must be "right" if its research had been done properly, GE placed the burden on the Union to show at the outset that the offer was "wrong" in some respect before any changes would be made (while at the same time withholding that offer for a substantial part of the contractual bargaining period). These policies impaired the Company's ability to evaluate objectively any modification proposed by a particular union by insisting that all union and nonrepresented employees must be treated uniformly, and tied the Company's credibility and prestige to strict adherence to its dogma (*supra*, pp. 3–5; 17–18). In June 1960, even before negotiations opened, the Company presented an accident insurance proposal to the Union on an acknowledged take-it-or-leave-it basis (*supra*, p. 6). During the early meetings, devoted by agreement to bargaining on employment security, GE would not reveal its proposals, even in general form, and its responses to the Union's detailed proposals were vague and uninformative (*supra*, pp. 7–10). When the Company finally made its

[10] Quoting from *Insurance Agents' Union*, *supra*, 361 U.S. at 484–485.

offer, it refused to make meaningful cost disclosures or to furnish the Union with other relevant information, and took rigid positions which it sought to defend with inconsistent and confusing explanations (*supra,* pp. 11–18).

While maintaining this inflexible and unhelpful stand at the bargaining table, the Company mounted a campaign for the purpose of disparaging and discrediting the Union in the eyes of its employee constituents. Thus, the Company refused to withhold publicizing its offer of August 30 until the Union had had an opportunity to propose suggested modifications (*supra,* pp. 10–11). It repeatedly told its employees that it had made a "firm, fair offer," that there was "nothing more to come," and that it would not change its position in the face of "threats" or a strike (*supra,* pp. 11, 16–18). As the Board found, the Company thereby "locked itself into a position where it could not deviate significantly from its original offer without impairing the credibility with employees that it considered so basic to its employee relations and the success of its bargaining techniques" (Pet. App. C240).[11]

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[11] Events during the strike provided further confirmation of the Company's lack of good faith. Thus, it unlawfully bypassed the IUE's national negotiators on strike truce terms to deal with local union officials (*supra,* p. 18); it insisted that the Union assent to the Company's offer without first seeing the final contract language (*supra,* p. 19); and it rejected the notion of a bilateral strike settlement agreement out of a "determination to adhere to the end to its basic bargaining philosophy, that employees must be made to understand that what it did it did 'voluntarily' and that union belligerence could not force it to make concessions of any kind, even to settle a strike" (Pet. App. C251–C252).

In sum, as the court of appeals concluded, the Board's inference of overall bad faith was based on a pattern of conduct which had two major facets: "first, a take-it-or-leave-it approach * * * to negotiations in general which emphasized both the powerlessness and uselessness of the Union to its members, and second, a communications program that pictured the Company as the true defender of the employees' interest, further denigrating the Union, and sharply curbing the Company's ability to change its own position" (Pet. App. A40). Such a combination of " 'take-it-or-leave-it' bargaining methods with a widely publicized stance of unbending firmness" constitutes "an absence of subjective good faith, for it implies that the Company can deliberately bargain and communicate as though the Union did not exist, in clear derogation of the Union's status as exclusive representative of its members under section 9(a)" (Pet. App. A53).[12]

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[12] Further emphasizing the limited nature of its holding, the court added (Pet. App. A52–A53): "We do not today hold that an employer may not communicate with his employees during negotiations. Nor are we deciding that the 'best offer first' bargaining technique is forbidden. Moreover, we do not require an employer to engage in 'auction bargaining,' or * * * compel him to make concessions, 'minor' or otherwise."

The basic difference between the court majority and the dissenting judge is that the latter found "no substantial evidence" that GE had adopted a "take-it-or-leave-it" attitude at the bargaining table (Pet. App. A67–A69), and, in his view, the Company's publicity campaign did not amount to a declaration that, as a matter of policy, the Company could never be persuaded to change the advertised terms (Pet. App. A74, n. 8). That disagreement on the facts does not require resolution in this Court.

3. The Board's finding of overall bad faith is not inconsistent with Section 8(d) of the Act, which states that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." As the court majority stated, "while the absence of concessions would not prove bad faith, their presence would, as GE claims, raise a strong inference of good faith" (Pet. App. A44). In short, the Board and the court majority evaluated the concessions allegedly made by the Company only because the Company itself insisted that they affirmatively demonstrated its good faith and lack of a take-it-or-leave-it attitude. Having thus placed the matter in issue, the Company is in no position to complain because the Board and court majority found, on analysis, that the concessions were of little substance (see Pet. App. A44, and n. 13).

Nor did the Board's reliance on the Company's communications to its employees run afoul of Section 8(c) of the Act. The legislative history of Section 8(c) discloses that Congress intended to prevent the Board from finding non-coercive expression of views, argument, or opinion to be an unfair labor practice, or to be evidence thereof when linked with wholly unrelated conduct; but it did not intend to alter the ordinary rules of evidence which make relevant communications, like relevant conduct, competent evidence as to motive or state of mind. Legislative History of the Labor Management Relations Act, 1947 (G.P.O., 1948), Vol. 1, 429–430 (Senate Report), 549 (House Conference Report); Vol. 2, 1541 (analysis of Senator

Taft). See also *Linn* v. *Plant Guard Workers,* 383 U.S. 53, 62, n. 5; *Darlington Mfg. Co.* v. *National Labor Relations Board,* 397 F. 2d 760, 768–769 (C.A. 4), certiorari denied, 393 U.S. 1023. Consistent with this principle, the Board considered GE's communications "only as part of the totality of its conduct reflecting on the state of mind with which it entered into and participated in the negotiations" (Pet. App. C243–C244). As shown, such communications were clearly relevant for that purpose.[13]

Finally, there is no merit to the Company's contention that the Board's order is too vague. As the court of appeals explained, the order apprises the Company that it "may not so combine 'take-it-or-leave-it' bargaining methods with a widely publicized stance of unbending firmness that [it] is [itself] unable to alter a position once taken"; it "is this specific conduct that GE must avoid in order to comply with the Board's order, and not a carbon copy of every underlying event relied upon by the Board to support its findings" (Pet. App. A53).

B. The Board's holding, adopted by the court below, that the Company independently violated Section 8(a)(5) and (1) of the Act by its take-it-or-leave-it accident insurance proposal is clearly correct, and, in any event, does not, in itself, present an issue of

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[13] For example, as the Board pointed out, the Company's adamant stand at the bargaining table in the latter part of September and the remarks of its negotiators that it would look ridiculous if it changed its offer "cannot be interpreted and evaluated except against the backdrop of the communications program" (Pet. App. C246).

sufficient importance to warrant further review. The Company contends that, since accident insurance was a matter covered by its existing collective bargaining contract with the Union, Section 8(d) of the Act relieved it of the duty to bargain about its June 1960 offer of additional coverage at least until negotiations commenced for a new contract.[14] However, as the Board concluded in *Equitable Life Insurance Co.*, 133 NLRB 1675, 1688–1694, the only other case where the precise issue has thus far arisen, the portion of Section 8(d) relied on by GE was designed for the protection of the party to a collective bargaining agreement who wishes to preserve the *status quo* as to matters covered therein, not for the party who wishes to change it. Where, as here, a party proposes a change during the contract term, he indicates a desire not to hold firm to the terms and conditions of the contract, at least with respect to that change. In this situation, there is no compelling reason for not requiring him to bargain about the proposal which he himself initiated, if the other party requests bargaining. Indeed, for the reasons given by the court below (Pet. App. A21), to permit an employer to offer a contract modification to a union on a take-it-or-leave-it basis tends to subvert the union's position as bargaining representative.

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[14] Section 8(d) provides, in relevant part, that neither party shall be required "to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."

C. The Board's conclusion that the Company had a duty to furnish the pension and insurance cost information which the Union had requested (see Pet. App. C187–C188) was unanimously affirmed by the court below (Pet. App. A25–A33, A57), and that conclusion is consistent with *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149. Accordingly, this issue also does not warrant further review. Petitioner's argument that what the Union desired was "not 'information' in the ordinarily accepted sense, but, rather, *predictions or estimates* * * *" (Pet. 36) is irrelevant. "The difficulty with this stand," the court below noted, "is that it would excuse the Company from furnishing virtually all information of which is was not absolutely certain"; the determinative factor is "whether the data 'would significantly aid in the bargaining process,'" and there is "no question that the information available would have assisted the Union here" (Pet. App. A33).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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